Map Based on Plaintiff's Exhibit 22, Showing Jamestown and Adjacent Areas; the Refinery Use District; the Location of Petitioners' Homes; and the Distances Involved.

LE COPY

IN THE

Supreme Court of the United States

No. 451

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINIONS BELOW

(1) Opinion of the District Court

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 2113

COMMERCE OIL REFINING CORPORATION, *Plaintiff*

v.

WILLIAM W. MISER, ET AL., *Defendants*

OPINION

January 5, 1959

DAY, District Judge. This is an action wherein the plaintiff seeks damages and injunctive relief against the defendants. Jurisdiction of this Court is based on diversity of citizenship and the existence of a controversy in the requisite amount.

Plaintiff's complaint contains two counts. In the first count plaintiff alleges in substance that on or about September 27, 1956, a license to engage in the refining, manufacturing and processing of petroleum products was issued to it by the Town Council of the Town of Jamestown in accordance with the provisions of Chapter 50 of the ordinances of said Jamestown, and that it paid a fee of $5,000 for said license; that refinery operations are a permissive use in a refinery use district in said town; that under the ordinances of said Jamestown, the laws of the State of Rhode Island and of the United States, plaintiff has a right to construct and operate a plant for the purpose of conducting refinery operations and intends to construct and operate such a refinery forthwith in such a refinery use district in said Jamestown; that the defendants have un-

lawfully combined and conspired to harass, delay and prevent plaintiff from exercising its right to construct and operate said refinery in said Jamestown; that pursuant to said unlawful combination and conspiracy to deprive plaintiff of its said right the defendants have unlawfully and maliciously resorted to the use of unlawful means, including certain overt acts, which are alleged therein; that it is informed and believes and alleges on information and belief that the defendants in furtherance of said unlawful combination and conspiracy intend to perform further acts to harass, delay and prevent it from constructing and operating said refinery, and that it has been damaged in the sum of $500,000. In this count, plaintiff demands that the defendants be enjoined during the pendency of this action and permanently "from unlawfully combining and conspiring against the plaintiff and from taking any action designed to harass, delay or prevent plaintiff from exercising its said rights etc.," and that it have judgment against the defendants and each of them in the sum of $500,000, the costs of this action and exemplary or punitive damages.

The second count alleges a cause of action arising under the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, 15, with jurisdiction of this Court based on the provisions of the Clayton Act, 15 U.S.C.A. § 12 et seq.; repeats the allegations with respect to the license, etc. contained in the first count; seeks similar injunctive relief as that demanded therein, and judgment against the defendants and each of them in the sum of $1,500,000, reasonable attorneys' fees and costs.

Defendants in their answers assert that the license upon which the plaintiff relies is invalid, that the amendment to the zoning ordinance of Jamestown creating a refinery use district is invalid, and that the amendment to the building ordinance whereby plaintiff was excused from compliance therewith is invalid. In addition, they filed counterclaims wherein they allege the invalidity of said license, the invalidity of said amendment to said zoning ordinance, and of said

amendment to the building ordinance. They also allege therein that the value of the real estate owned by them will be substantially reduced and destroyed, and that said real estate will be rendered unfit and uncomfortable for its enjoyment by the erection and operation of said refinery, and that said refinery will constitute a continuing nuisance to them.

In their counterclaims the defendants seek a declaratory judgment that said license and said amendments are void; and temporary and permanent injunctions enjoining the plaintiff from taking any further action or doing any act purported to be authorized under said license and said amendments; and such other or further relief as may be required by equity and good conscience.

Plaintiff in its reply to the counterclaims denies that said license and amendments are invalid, and further by way of defense to said counterclaims alleges that the defendants have been guilty of such laches as should in equity bar them from maintaining said counterclaims because the plaintiff "in reliance on the validity of said ordinances and said license" and on defendants' failure to bring any legal or equitable proceedings to challenge the validity thereof has taken certain steps, including the acquisition of lands, the expenditures of large sums of money, etc.

Subsequent to the filing of its reply, the plaintiff moved for the entry of a summary judgment in its favor dismissing said counterclaims. This motion was denied by me on February 7, 1958. See Commerce Oil Refining Corporation v. Miner, 22 F.R.D. 5.

When this case was reached for trial, plaintiff announced in open court that it did not intend to offer any evidence in support of its claim of an illegal conspiracy by the defendants against it, and upon motion by the defendants its complaint was dismissed with prejudice. The trial then proceeded on the defendants' counterclaims.

The trial, which lasted for more than forty days, produced a record of nearly 6,000 pages and a great many ex-

hibits. Apart from the presentation of detailed testimony as to the circumstances attendant upon the adoption of said amendments to the zoning and building ordinances and the adoption of an ordinance and the issuance to the plaintiff of a license thereunder, many days of the trial were devoted to the presentation of testimony by expert witnesses on the question of whether the operation of the refinery as planned will constitute a nuisance to the defendants.

The issues developed by the pleadings and the evidence are (1) the validity of said amendments to the zoning and building ordinances, (2) the validity of the license granted to the plaintiff and (3) whether the operation of said refinery at the location specified and in the manner proposed by the plaintiff will constitute a nuisance to the defendants or any of them.

Plaintiff contends that the defendants have no standing to attack the validity of amendments to the zoning and building ordinances or the validity of the license or the ordinance pursuant to which it was granted. In my opinion this contention is without merit. It is well settled in Rhode Island that if a party can show that an amendment to a zoning ordinance is illegal and that the value of his property is injured or substantially threatened with injury by its enforcement, he is entitled to relief in equity with respect to such illegal amendment. In Rhode Island Home Builders v. Hunt, 1948, 74 R. I. 255, the Supreme Court said at page 259:

> "... When his rights are injured or substantially threatened with injury by the enforcement of the alleged illegal amendment to the zoning ordinance and he is able to establish the illegality of such amendment, he has ample remedy through ordinary proceedings in equity."

That the same rule applies in Rhode Island to the amendment to the building ordinance and license aspects of this case is implicit in the decision of the Supreme Court of

Rhode Island in Order of St. Benedict in Portsmouth v. Town Council of Portsmouth, 1956, R. I., 120 A. 2d 329. In that case the petitioner applied for certiorari to review and quash the action of the respondents in granting a building permit to erect and a license to operate an oil refinery to the plaintiff in this action. The Supreme Court in refusing to grant the relief sought pointed out that at common law the issuance of a writ of certiorari rested in the discretion of the Court, and held that in the exercise of that discretion it would not issue the writ because of the pendency of other proceedings in equity instituted by the petitioner to secure relief from the grievances alleged in the petition for certiorari.

Similarly, the federal courts have long adhered to the doctrine that private persons may attack the validity of municipal ordinances in equity proceedings when ordinary remedies do not afford full protection against the threat of substantial harm. General Electric Ry. Co. v. Chicago, I. & L. Ry. Co., 1960, 7 Cir., 98 F. 907, aff'd. on rehearing, 107 F. 771; Seattle Gas & Electric Co. v. Citizens Light & Power Co., 1903, C.C. Wash., 123 F. 588.

In this case the defendants have produced ample evidence that their rights are substantially threatened with injury by the continued enforcement of said amendments to the zoning and building ordinances, and the ordinance under which said license was granted. Under the laws of Rhode Island the defendants thus have standing presently to attack their validity in this Court.

I

Validity of the Amendments to the Zoning and Building Ordinances

The original zoning ordinance of the Town of Jamestown which the Town Council purported to amend by the creation of said refinery use district on September 27, 1956 was adopted on August 28, 1935. The evidence establishes and plaintiff concedes that due notice of the hearing on its

proposed adoption was not given prior thereto as required by the state enabling act authorizing cities and towns to adopt zoning ordinances. As a consequence thereof the zoning ordinance was invalid and void on September 27, 1956 when the Town Council purported to enact the amendment thereto creating the so-called refinery use district. R. I. Home Builders, Inc. v. Budlong Rose Co., 1950, 77 R. I. 147. Since it was void, the amendment thereto is likewise void unless it can be said to be complete and perfect in and of itself. Lassiter v. Atlantic City, 1914, 86 N.J.L. 87, 90 A. 675; City of Chicago v. McKinley, 1931, 344 Ill. 297, 176 N. E. 261; Board of Com'rs. of City of Newark v. Grodecki, 1943, 21 N. J. Misc. 241, 33 A. 2d 115; cf. City of LaCrosse v. Elbertson, 1931, 205 Wis. 207, 237 N.W. 99. It is obvious that the amendment was not intended as an original zoning ordinance independent of and apart from that which it purported to amend, and if it were so intended, it must be deemed to be void and of no effect because as the record establishes it was not, prior to its enactment, approved by a financial town meeting of said Town of Jamestown, as required by Sec. 1 of Chapter 342 of the General Laws of Rhode Island, Revision of 1938. Cf. R. I. Home Builders, Inc. v. Budlong Rose Co., supra.

Prior to its amendment, the building ordinance of said Town, Chapter XLIV, contained among other provisions, the following:

> "Section 3. Every person intending to build, construct, reconstruct or alter any building structure or foundation, including temporary structures, platforms or stands for assembly purposes, shall before commencing the same, file with the Inspector of Buildings an application for a building permit on a form provided therefor, shall pay a fee therefor at the rate of $1.00 for each $1000 of estimated cost of the structure and shall at any time, if required by the Inspector of Buildings or Board of Appeal, file the plans, specifications and details or other full and accurate descrip-

tion of the intended building, construction or reconstruction or alteration. This shall be in addition to such permits as may be required by the laws of Rhode Island for specific classes of building."

Said amendment, adopted September 27, 1956, contains the following provisions:

"Section 48. The provisions of this ordinance, Chapter XLIV, shall not apply to buildings, structures, foundations, storage tanks, vessels, or any other facility constructed, to be constructed or altered, designed or used for the refining of petroleum or the manufacture, process or storage in bulk or commercially of gasoline, gas, crude petroleum, gasoline, kerosene, heating fuels, lubricating oils and greases, or of allied petroleum products or substances derived from the refining of petroleum."

The effect of said amendment is to exempt all buildings, structures and other facilities used for the refining of petroleum and allied products from the provisions of the building ordinance of said Town. Authority to enact said building ordinance and any amendment thereto was conferred upon said Town by the provisions of section 52 of Chapter 333 of the General Laws of Rhode Island, Revision of 1938, which in part provided as follows:

"Sec. 52. Town and city councils and the representative council of the City of Newport may from time to time make and ordain all ordinances and regulations for their respective towns and cities, not repugnant to law, as they may deem necessary, regulating the manner of constructing and equipping of all buildings and other structures within said town or city which may be erected, altered or repaired after the passage of such ordinance . . ."

Defendants contend that this statute only authorized the Town by ordinance to regulate the manner of constructing and equipping *all* buildings and other structures within said town, and did not authorize it to regulate the manner of constructing and equipping some buildings and to exempt others from all regulation. Plaintiff, on the other hand, claims that said statute permits but does not require the regulation of the manner of constructing and equipping of all buildings and structures in the event a municipality elects to enact a building ordinance pursuant thereto, and that reasonable classification and exemption from building regulations are not prohibited thereby. Assuming but without deciding that plaintiff's interpretation of said statute is correct, the specific exemption from said ordinance provided by said amendment is in itself a regulation within the meaning of said statute. To be valid the regulations and ordinances of a municipality "must find their justification in some aspect of the police power, asserted for the public welfare." Village of Euclid v. Ambler Realty Co., 1926, 272 U. S. 365, 387. They must bear a rational and substantial relation to the health and safety of the community. Doherty v. Town Council of South Kingstown, 1938, 61 R. I. 248; Robinson v. Town Council of Narragansett, 1938, 60 R. I. 422; Standard Oil Company of New Jersey v. City of Charlottesville, 1930, 4 Cir., 42 F. 2d 88; 5 McQuillin, Municipal Corporations (3rd ed.) § 19.14.

It is a matter of common knowledge that an oil refinery is a potential source of danger from fire and explosion unless properly constructed. And it is similarly a matter of common knowledge that such danger from fire and explosion can be substantially lessened if not entirely eliminated by the imposition of proper restrictions and safeguards relating to its construction.

The record in this case is completely devoid of any evidence which could possibly support a finding that said amendment to the building ordinance is conducive to the conservation of the public health, safety or welfare of said

Town. In my opinion it cannot be sustained as being within the lawful exercise of the police power of the municipality, and is accordingly invalid.

II

Validity of the License

Plaintiff's license was granted pursuant to Chapter 50 of the ordinances of said Town of Jamestown which was also enacted on September 27, 1956, at the same meeting of the Town Council when the amendment to the building ordinance hereinbefore discussed was adopted by that body. It was enacted pursuant to the provisions of section 21 of Chapter 333 of the General Laws of Rhode Island, Revision of 1938, which provides as follows:

> "Sec. 21. Town councils and city councils may from time to time make and ordain all ordinances and regulations for their respective towns, not repugnant to law, which they deem necessary for the safety of their inhabitants from the manufacture, processing, storage, keeping, having in possession, sale or use of... crude petroleum, gasoline, kerosene, heating fuels, lubricating oils and greases, allied petroleum products, and any and all other explosives, explosive chemicals and inflammable substances, and may prohibit the manufacture, storage, keeping, having in possession, transportation, sale or use by any and all person or persons of any or all said substances and gases in their respective towns, unless a license for the same shall be first obtained from the town council or board of aldermen, which license shall be henceforth effective unless revoked for good and sufficient cause by order of said town council or board of aldermen..."

Section 1 of said Chapter 50 is as follows:

> "Section 1. No person, firm or corporation shall, from and after the passage of this ordinance, engage in the

refining, manufacturing or processing of crude petroleum, petroleum products or substances derived therefrom in connection with such refining, manufacturing or processing of crude petroleum, petroleum products or substances derived therefrom within the Town unless a license for the same shall be first obtained from the Town Council."

Section 2 thereof sets forth the information which must be furnished by an applicant for a license but includes a provision that the Town Council may at any time upon such terms and conditions as it may deem advisable waive "the filing of any of the foregoing requirements". Section 3 provides that the Town Council may consider and take such action on any application for a license under said ordinance as it "may deem proper with due consideration for the safety of the inhabitants of the Town of Jamestown". Section 5 of said ordinance provides that no licensee shall engage in the refining, etc. of crude petroleum except upon certain conditions therein set forth in sub-sections 5(a) to 5(h) inclusive. Most, if not all, of these sub-sections incorporate by reference standards promulgated by certain national organizations.

Sub-section 5(a) provides that all facilities used for refining, etc. shall be constructed, installed, etc. so as to conform at all times with the "Standards of the National Board of Fire Underwriters for the Storage, Handling and Use of Flammable Liquids as Recommended by the National Fire Protection Association". Sub-section 5(b) provides that all pressure vessels used for refining, etc. shall be constructed, installed, etc. so as to conform at all times with the standards set forth in the American Petroleum Institute—American Society of Mechanical Engineers 'Code for Unfired Pressure Vessels for Petroleum Liquids and Gases' (1952) or 'Rules for Construction of Unfired Pressure Vessels, Section VIII, ASME Boiler Construction Code' (1950), of the American Society of Mechanical Engineers. Sub-sec

tion 5(c) provides that all heat exchangers shall be constructed, installed, etc. so as to conform at all times with the standards set forth in the American Petroleum Institute —American Society of Mechanical Engineers Code for 'Unfired Pressure Vessels for Petroleum Liquids and Gases' (1952) and the standards of the Tubular Exchanger Manufacturers Association, Class R. Sub-section 5(d) provides that all piping systems shall be constructed, installed, etc. so as to conform at all times to the applicable portions of the 'American Standard Code for Pressure Piping', (A.S.A. B31.1—1951), and sub-section 5(e) provides that all electrical equipment shall be constructed, installed, etc. so as to conform to the standards of the National Electrical Code. Sub-section (f) requires that all premises used in the refining, etc. of crude petroleum shall be surrounded by a fence of noncombustible materials of a minimum height with "a sufficient number of gates to provide adequate access for fire extinguishing purposes", and sub-sections (g) and (h) contain requirements for the installation of a foam-fire protection system and first aid fire control equipment according to certain standards incorporated by reference therein.

The parties agree that said ordinance was adopted without a public hearing on the question of its enactment and without notice of such hearing by publication in a newspaper as provided in said section 52 of Chapter 333 which authorizes town and city councils to make and ordain ordinances regulating the manner of constructing and equipping of all buildings and structures in their respective towns and cities. This section provides in part as follows:

"52. . .

No such ordinance shall be enacted, amended or repealed until after a public hearing has been held upon the question of the enactment, amendment or repeal of such ordinance, before said town, city or representative council, which council shall first give notice of such hearing by publication in a newspaper printed in said

town or city, if any, and, if none, then in a newspaper published in the county in which said city or town is located . . ."

Defendants contend that said Chapter 50 is invalid because (1) the standards incorporated by reference therein were not in fact known to the Town Council, (2) it is in reality a building ordinance and was not enacted after a public hearing of which notice was given by publication in a newspaper as provided in said section 52 of Chapter 333 of the General Laws of Rhode Island, Revision of 1938, (3) the provisions contained therein for an appeal from actions of the Town Council thereunder are invalid and (4) it lacks definite standards for the grant of licenses thereunder.

In my opinion it is unnecessary for me to consider all of the aforesaid contentions. Although counsel for the parties hereto during the trial and in their respective briefs have consistently referred to said Chapter 50 as "the licensing ordinance", it is entitled "An Ordinance Authorized By Section 21 of Chapter 333 of the General Laws of Rhode Island (1938) As Amended, Providing For The Safety Of The Inhabitants Of The Town Of Jamestown From The Refining, Manufacturing Or Processing Of Crude Petroleum, Petroleum Products Or Substances Derived Therefrom, Or The Storage Or Handling Of Crude Petroleum, Petroleum Products Or Substances Derived Therefrom In Connection With Such Refining, Manufacturing Or Processing Of Crude Petroleum, Petroleum Products Or Substances Derived Therefrom".

While it is true that legislative intent is to be found primarily in the language of an ordinance, yet that language is to be construed in the light of the facts and circumstances attendant upon the passage of such ordinance. Cf. Blais v. Franklin, 1910, 31 R. I. 95. It must be remembered that said Chapter 50 was enacted at the same meeting at which said amendment to the building ordinance was adopted. This is an important circumstance to be consid-

ered in determining the intent of the Town Council in enacting said Chapter 50. Doherty v. Town Council of South Kingstown, supra.

I am unwilling to believe that the Town Council when it adopted said amendment to the building ordinance intended that there would be no regulations or restrictions of any sort on the manner of constructing and equipping the proposed refinery. On the contrary, a study of the provisions of said Chapter 50 and of the codes incorporated by reference therein satisfies me that the Town Council intended thereby to regulate its construction and equipment. In my judgment those sub-sections are for the most part building regulations within the purview of said section 52 of Chapter 333.

It is the well-settled rule that cities and towns have no powers to enact ordinances except those powers from time to time delegated to them by the legislature. And it is a fundamental rule of construction that such powers, being delegated, should be strictly construed. In re Opinion to the House of Representatives, 1939, 62 R. I. 347; Heeney v. Sprague, 1877, 11 R. I. 456.

The only authority vested in the cities and towns of this state to enact building ordinances is that conferred upon them by said Section 52. Its provisions clearly preempt the field; and when such authority is conferred it may only be exercised in strict conformity with the terms of the grant. Standard Oil Company of New Jersey v. City of Charlottesville, supra; cf. R. I. Home Builders, Inc. v. Budlong Rose Co., supra. Absent such compliance, it follows that the provisions of said sub-sections 5(a) to 5(h), inclusive, insofar as they are building regulations are null and void.

The question then arises—what is the effect of their invalidity? Chapter 50 contains a "severability clause", so-called, which in essence provides that if any provision or provisions thereof shall be declared invalid, this determination shall in no wise affect the validity of its remaining provisions. But such a clause is not decisive of the effect

of the invalidity of a portion or portions of an ordinance upon its remaining portions. The rule is well stated in Heubeck v. City of Baltimore, 1954, 205 Md. 303, 107 A. 2d 99 at 103-104, where the Court held:

> ". . . regardless of such a clause, an act must fail entirely if the effect of declaring a portion of it invalid would render the remainder incapable of effecting the purpose for which the act was enacted."

To the same effect, see The Narragansett Indians, 1898, 20 R. I. 715; State v. Tonks, 1886, 15 R. I. 385; F.T.B. Corporation v. Goodman, 1949, 300 N. Y. 140, 89 N. E. 2d 865.

It is manifestly clear that the Town Council by the enactment of the sub-sections 5(a) to 5(h), inclusive, intended to control the manner of constructing and equipping of the refinery as well as its manner of operation. Since the provisions of said sub-sections which I have found to be null and void are so interwoven with the remaining provisions thereof that they cannot be separated, it follows that section 5 must fail in its entirety. The invalidity of said section 5 compels me to conclude that the whole of Chapter 50 must likewise fail, because the intention of the Town Council will not be served by the remaining portions of said chapter which, if given effect, would leave the construction, equipping and operation of the proposed refinery without effective control or regulation by the Town Council. It follows that the license issued pursuant thereto is also invalid.

III

The Issue of Anticipated Nuisance

The determination of whether the erection and operation of the proposed refinery will constitute a continuing nuisance to the defendants must be determined by resort to Rhode Island law.

In Blomen v. N. Barstow Co., 1913, 35 R. I. 198, 209-210, the Supreme Court of Rhode Island quoted with approval

the rule laid down in Campbell v. Seaman, 63 N. Y. 568 at page 576:

> "'As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality, and under some circstances, may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient'".

And in determining whether a particular use is a nuisance, the location thereof is an important consideration. In Kennedy v. Frechette, 1924, 45 R. I. 399, 405-406, the Supreme Court said:

> "The location is always an important consideration in the determination of the existence of a nuisance. It is clear that the location is *not* a manufacturing one. . . . Is the use of the property in the particular location reasonable or unreasonable, considering not only the rights of the owner, but also those of his neighbor. If such use causes a substantial diminution either in the value of adjacent property, or in the enjoyment thereof as measured by the degree of comfort which the average man living in such a neighborhood has a right to expect, it may properly be held to be unreasonable and hence a nuisance."

To the same effect, see Aldrich v. Howard, 1865, 8 R. I. 246; Strachen v. Beacon Oil Co. 1925, 251 Mass. 479, 146 N. E. 787; Dahl v. Utah Oil Refining Co. 1927, 71 Utah 1, 262 P. 269.

Defendants seek a permanent injunction against the proposed erection and operation of said refinery as an antici-

pated nuisance. To entitle them to that relief under the law of Rhode Island, the evidence must show clearly and convincingly that substantial diminution in the values of their properties or in the enjoyment thereof will be practically certain to result from the erection of the refinery or from its operation. In Otto Seidner, Inc. v. Ralston Purina Co., 1942, 67 R. I. 436, where plaintiff, the owner of a business, sought an injunction to prevent the defendant from erecting and operating a coal pocket in an industrial district on the ground that the proposed erection and operation of said coal pocket would constitute a nuisance to the plaintiff, the Supreme Court held at page 452:

> "We are of the opinion that to justify an injunction, in a cause of the character of the instant one, the evidence must show clearly and convincingly that substantial damage to the complainant's property or business will be practically certain to result from the operation by the respondent of the business against which an injunction is sought."

The Town of Jamestown is an island situated in Narragansett Bay within the State of Rhode Island. Its area is approximately 9.3 square miles. It is primarily a residential, resort and farming area. At the present time, no industries of any sort are located thereon and there are only relatively few business enterprises, such as retail shops, stores, gasoline filling stations and hotels. It enjoys considerable popularity as a resort area during the summer.

The refinery district, so-called, irregular in shape, extends completely across the northerly portion of the island. The area of this district in which plaintiff proposes to erect its refinery is 814.72 acres, of which 604.72 are owned by plaintiff and the remainder by other persons, including the defendants Florence E. B. Wright, George F. Wright, Louis F. Wright, Virginia C. Wright, Henry E. Wright, Rita Wright, George E. Wright and Virginia W. Wright, who have homes on their lands. At the time of the trial of this

case there were sixteen (16) dwelling houses in said district, one having been destroyed by fire since September 27, 1956. The remainder of the land therein is vacant. While a small portion of it is swampy and overgrown with scrub, most of said land is cleared and dry. Eighty-five per cent of it was described in the testimony as good farm land, suitable for farming or home sites. South of said district and about two miles therefrom are at least one hundred forty-three homes in the Jamestown Shores development, so-called, and to the north and within about one and one-half miles therefrom there are seventy-one homes, a summer hotel and a camp comprising eleven or twelve buildings.

The evidence establishes that the prevailing winds on the island are from the southwest and from the northwest. Wind velocities during at least a third of the year range from calm to fourteen miles per hour and fogs of varying duration enveloping the island occur with relative frequency.

The defendant William W. Miner owns and resides on residential property which abuts upon the easterly end of said district. The remaining defendants are the owners and occupants of residential properties situated at points approximately two-thirds of a mile to four miles away from said district. The properties of the defendants Terrance McGaughan and Burgess Lunsford are located to the north of said district, and the properties of the remaining defendants to the south and southeast of said district. The homes owned by the defendants range in value from $4,000 to $50,000. Most of them, if not all, are substantially constructed, well maintained and attractively landscaped.

During the trial the plaintiff produced upon the demand of the defendants what it termed the design plans of the proposed refinery. From the testimony presented by the plaintiff at the close of the defendants' evidence, it would appear that substantial changes in these plans had been effected by the plaintiff since the opening of the trial, in

order to meet some of the criticism thereof made by the defendants. If these changes purported to have been made have in fact been made, they would serve to eliminate or mitigate to some degree some of the sources of the nuisance which the defendants claim are certain to result from the operation of the proposed refinery. For the purpose of my decision, I shall assume that these changes have been made. But despite these assumed modifications, the evidence establishes that the proposed refinery will comprise, among other structures, at least fifteen stacks ranging from twenty to two hundred feet in height which will contain many thousands of feet of piping, countless joints and connections, nearly one hundred unfired pressure vessels of varying sizes and constructions, approximately four hundred pumps, thousands of seals and compressors, tanks, heat exchangers, and like equipment.

According to the evidence plaintiff will refine forty-three thousand (43,000) barrels of Kuwait crude oil each day in its refinery, slightly less than the total daily capacity of all the oil refineries in New England at the present time. Kuwait crude oil is a sour crude oil having a sulfur content of approximately 2.5%. The refinery will be operated twenty-four hours per day, seven days a week throughout the year, with brief shut-downs once a year for maintenance and repair purposes. The products to be produced are high octane gasoline, liquified petroleum gas (LPG), and heating fuel oils. By-products to be produced will be petroleum coke and elemental sulfur.

Three types of processes will be used to convert the crude oil into gasoline, LPG and heating oils. The first of these is distillation, wherein the crude oil is heated at very high temperatures and gas, gasoline, and a variety of oils are separately boiled off at different temperatures and collected for further processing. This process, distillation, will occur in the crude and vacuum units of the refinery. A second process whereby gas, gasoline and heating oils are also produced will take place in the fluid catalytic cracking unit.

In this process the molecular structure of a portion of the oil produced in the distillation process is chemically changed by the application of heat, pressure and a catalyst with the result that the larger molecules of oil are "cracked" into smaller molecules of gas, gasoline and heating oil. In the third process, smaller molecules of gas resulting from earlier processes are chemically converted by heat, pressure and catalysts into heavier molecules of gasoline in the alkylation and polymerization units.

In the various stages of the above processes large quantities of hydrogen sulfide are produced. Plaintiff proposes to collect this hydrogen sulfide and to convert it into elemental sulfur, a salable by product. Hydrogen sulfide is a particularly malodorous gas described as having an odor like rotten eggs and as being detectable in very low concentrations. It is highly toxic and in sufficient concentrations injurious to health. Another inevitable product of the refining processes is the production of a group of gaseous hydrocarbons known as mercaptans. These are likewise particularly obnoxious and are detectable by smell in extremely low concentrations. Plaintiff proposes to collect and burn them in an incinerator and thereby prevent their escape to the atmosphere. An additional waste product similarly resulting of necessity from the refining processes is sulfur dioxide (SO_2). It is undisputed that the volume of SO_2 which will be discharged into the atmosphere from the stacks of the refinery will depend upon the efficiency of its sulfur recovery unit and upon the sulfur content of the fuel oil burned in the refinery to supply heat for its various processing units.

While the proposed refinery is so designed that fuel oil having a sulfur content in excess of four and one half (4½) per cent may be burned in its heaters, plaintiff claims that it does not intend to use fuel oils having a sulfur content in excess of two and one half (2½) per cent. It insists that it will use only fuel oils of that limited sulfur content regardless of their cost, and disclaims by at least one

of its witnesses any intention of using the residuals from its crude vacuum unit to supply heat, although the design of the refinery would permit of such use. Much testimony of a conflicting nature as to the economics of such a practice and the likelihood of its being followed by the plaintiff was produced at the trial. However, giving full credence to the plaintiff's proposed intention in this regard and assuming that the sulfur recovery unit will operate at all times to its maximum efficiency, it is clear that the minimal quantity of SO_2 to be discharged each day into the atmosphere will be thirty-seven tons. SO_2 is a gas having a disagreeable, suffocating odor like that of burned sulfur matches. It is detectable in a concentration of 2.5 parts per million of the atmosphere, and in concentrations of more than five parts per million has an irritating effect upon the nose, throat and eyes. The extent of its irritant effect depends upon the length of one's exposure thereto. If the exposure be for only a few seconds, its effect may be only to produce tears. If exposure be prolonged, engorgement of the blood vessels of the eyes and irritation of the nose and throat result. In persons suffering from respiratory ailments or heart diseases its effect is to aggravate such ailments and diseases and produce added discomfort.

When combined with water or moisture in the atmosphere, SO_2 becomes converted into sulphurous acid which in turn may be converted into sulphuric acid. These acids are highly corrosive to iron and steel and are destructive of plant life.

The crude oil to be refined will be brought by tankers from the Middle East to Jamestown. Plaintiff proposes to construct a landing dock off the east shore of the island from which the oil will be pumped through pipes to the crude storage area and then to the process units. The plans for the proposed refinery would seem to indicate that the crude oil will be kept at all times in an enclosed system from the time of its arrival through the completion of the refining processes. For this reason plaintiff contends that it follows

that none of the offensive and obnoxious odors incident to and connected with the refining operations will escape into the atmosphere, with the exception of SO_2.

The evidence further shows that the plaintiff will draw large quantities of salt water from Narragansett Bay for cooling certain refinery units. The total amount so used will be at least 100,800,000 gallons each day. After circulating through the heat exchangers it will pass through a cooling pond and will be discharged into the bay. In addition, process water used in the refining processes and water used to wash platforms, walks and other areas in the processing units, amounting to more than 2,000,000 gallons each week, after treatment to remove certain hydrocarbon compounds with which it has become contaminated and after passing through an oxidation pond will also be discharged into the bay together with storm water accumulating in the processing units and in the crude storage area.

Considerable testimony was also presented by the parties as to the extent of the illumination of the refinery at night. While the extent of this illumination was sharply disputed, it is obvious that the refinery will be illuminated to a degree sufficient to permit persons employed therein to perform their work on the ladders, walks and platforms of the refinery structures and in the areas surrounding them, with efficiency and safety. Likewise, there was a sharp dispute as to the amount of smoke that would be discharged by the refinery.

Many days were devoted to the presentation of opinion evidence as to the results that would accompany the operation of the refinery. For the expert witnesses, this trial must have been a dream realized.

Defendants contend that the evidence establishes that the erection and operation of said refinery will constitute a private nuisance to them against which they are entitled to injunctive relief. In support of their claim they argue that the evidence shows as certain sources of this nuisance the following: (1) the flare on the refinery; (2) the glare from

the nocturnal illumination of the refinery structures; (3) dust emitted from the catalytic unit; (4) smoke emitted from the stacks and process heaters; (5) pollution of the waters of the bay by the discharge of waters used in the refining processes and of waters from the storm water system, and by virtue of spills and leaks in the loading and unloading of tankers; (6) discharge of SO_2 into the atmosphere; (7) the emission of hydrogen sulfide; (8) the emission of mercaptans; (9) the emission of general refinery odors; and (10) injury to health.

Plaintiff, on the other hand, contends that the defendants failed to sustain the burden of proof imposed upon them in order to entitle them to the relief which they seek. In addition, they argue that the sentiment of the Town of Jamestown, as evidenced by the actions of the Town Council, though invalid, and by the vote of the qualified electors of said town in favor of the erection of a modern oil refinery is persuasive against the grant of any injunctive relief here. In support of this argument plaintiff quotes certain language from the opinion in Tuttle v. Church, 1892, C.C. R. I., 53 F. 422. In my opinion, there is nothing in the holding in that case which supports such an argument. Moreover, that case is obviously distinguishable from the instant one. There the plaintiff sought to enjoin the operation of a factory which was engaged in the making of fish oils and fertilizers, which had been in operation for more than thirty years. In denying injunctive relief to the plaintiff the court found that not only had the plaintiff been guilty of laches, but that the defendant's plant caused only occasional offensive odors during the summer months and that its operation caused no serious damage to anyone. While the sentiment of the Town of Jamestown, as evidenced by the actions of the Town Council and by the vote of the electorate is a circumstance to be considered here, it must be remembered that they did not have the opportunity to consider and evaluate the detailed testimony by experts in oil refining that was presented during the protracted trial of this case.

To attempt to summarize the testimony of the numerous expert witnesses called by the parties would serve no useful purpose and would unduly prolong this opinion. While defendants have cited many respects in which they claim the proposed refinery will be a nuisance, entitling them to injunctive relief, I do not believe it necessary to consider or discuss all of them.

Here it is undisputed that obnoxious gases such as hydrogen sulfide and mercaptans will be produced in the refining process. While the plaintiff contends that there will be no escape of these gases and cites the devices and procedures it will employ to contain them, neither the record nor the testimony of their experts sustains this contention. The most that can be said for said devices and procedures is that they will be nearly completely effective under the most ideal conditions. But having in mind the highly corrosive qualities of Kuwait crude oil and the volume of crude oil to be processed each day, I am satisfied that varying quantities of these obnoxious gases will find their way into the atmosphere at all times when the refinery is in operation. To assume that they will not be carried by the prevailing winds beyond the relatively small area upon which a refinery of the size contemplated is to be located would be far from realistic. On the contrary, the credible testimony in this case establishes that said gases will be carried by the prevailing winds at all times to the properties of some of the defendants, and, because of their extremely disagreeable odors in very low concentrations and their cumulative effect, they will seriously diminish both the value of the defendants' lands as residential properties and the enjoyment thereof. The same observation may be made with respect to the general refinery odor described in the testimony as being an inevitable incident to refining operations.

Insofar as SO_2 is concerned, it is abundantly clear that at least thirty-seven tons thereof will be discharged into the atmosphere each day. It is undisputed that this malodorous gas is detectable by smell in a concentration of 2.5

parts per million and that in concentrations of more than five parts per million it has an irritating effect of varying degrees, depending upon the health of an individual and the length of his exposure to it. In answer to a hypothetical question which included no recital of the volume of SO_2 to be discharged from the stacks of the proposed refinery, an expert witness for the plaintiff testified that the ground concentration of SO_2 at a point beyond the nearest property line of the defendant Froberg would not exceed 0.4 parts per million under the most unfavorable conditions, and hence its presence would not be detectable on his property or beyond it. Under cross-examination, however, this same witness admitted that he could not determine such ground concentrations without knowledge of the volume of SO_2 that was being emitted by the stacks. His opinion as to ground concentrations of SO_2 is in my judgment entitled to no weight. The credible testimony satisfies me that, depending upon atmospheric conditions, wind velocities, and the prevailing winds, as shown by the evidence of past annual weather conditions on the Island of Jamestown, there will be frequent concentrations of SO_2 on the property of the defendant Froberg in excess of 2.5 parts per million; and that it is reasonable to conclude that the properties of the other defendants will be frequently visited with similar concentrations carried to their premises by the prevailing winds, and that these concentrations will serve to effect a substantial diminution in the values of their properties and in the enjoyment thereof.

The evidence establishes that the State of Rhode Island has enacted legislation to prevent the pollution of public waters and that the Division of Sanitary Engineering of the Department of Health of said state has, pursuant to said legislation, promulgated regulations which prohibit the discharge of effluents from oil refineries into the public waters of said state except pursuant to a license granted only after the approval by said Division of the processes and methods of discharge. The evidence further discloses that the

plaintiff has applied for such a license and that its proposed processes and methods, or at least some of them, appear to be under consideration by that Division. Under the circumstances, I am unwilling to assume that said Division will not perform the duties imposed upon it by said legislation in a competent and conscientious manner and believe that I should not now consider or pass upon that issue. See Interstate Milk Handlers v. Hoffman, 1955, 34 N. J. Super. 356, 112 A. 2d 574; Kahl v. Consolidated Gas, Electric Light & Power Co., 1948, 191 Md. 249, 60 A. 2d 754; cf. Willapoint Oysters, Inc. v. Ewing, 1949, 9 Cir., 174 F. 2d 676, cert. den. 338 U. S. 360; Ellison v. Rayonier, Inc., 1957, D. C. Wash., 156 F. Supp. 214.

The evidence in this case also establishes beyond doubt that the area wherein plaintiff proposes to erect and operate its refinery is entirely residential and agricultural. Defendants' homes are substantial, attractive and well maintained. They afford their owners a degree of comfort and enjoyment not to be found in urban or industrial communities. The air of the locality is ideal from the standpoint of the absence of air pollution. They are not now located in a manufacturing community where the air is inevitably impregnated with disagreeable odors and impurities, features that are the concomitants of life in such a community. Plaintiff now seeks to change the character of the area where defendants' homes are located by the establishment of its oil refinery therein.

In determining whether the proposed refinery will be a nuisance to the defendants against which they are entitled to relief, the fact that it may be useful or may contribute to the economic welfare of Jamestown, is not determinative. In Blomen v. N. Barstow Co., supra, the Supreme Court, in rejecting respondent's argument that the issuance of an injunction against the respondent would work a detriment to the public, at page 205 quoted with approval from Broadbent v. Imperial Gas Co., 7 De G. M. & G. 436, aff'd. 7 H.L. Cas. 601, where the court stated:

"If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on . . . But unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action toties quoties. That would be a disgraceful state of the law and I quite agree with the vice-chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas."

The plaintiff has not cited and I have been unable to find any decision of the Supreme Court of Rhode Island which in any way impairs the rule laid down in Blomen v. N. Barstow Co., supra. Certainly there is nothing in the opinion of Rose v. Socony Vacuum Corp., 1934, 54 R. I. 411, cited by the plaintiff, which may fairly be said to do so. The desirability of improving the economic welfare of the Town of Jamestown is beyond dispute. But that laudable objective is not to be attained by the erection and operation of the proposed refinery on plaintiff's lands if such use, considering not only the rights of the plaintiff but also those of the defendants, will be unreasonable and hence a nuisance.

After a careful consideration of all the testimony and the reasonable inferences to be drawn therefrom, and recognizing the right of the plaintiff to make a reasonable use of its lands, I am satisfied that the operation of said refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man living in such a locality has the right to expect. It

follows that said use will be unreasonable and hence a nuisance to the defendants against which they are entitled to injunctive relief.

A judgment may be entered declaring that said license, said amendment to said Chapter XXXV and said amendment to said Chapter XLIV are null and void, and permanently enjoining the plaintiff from taking any further action or doing any act purported to be authorized by said license and said amendments and from operating said proposed refinery in said Town of Jamestown.

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(2) Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5475

COMMERCE OIL REFINING CORP., *Plaintiff, Appellant*

v.

WILLIAM W. MINER, ET AL., *Defendants, Appellees*

Appeal from the United States District Court
For the District of Rhode Island

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

OPINION OF THE COURT

June 16, 1960

WOODBURY, *Chief Judge*. Commerce Oil Refining Corporation, Commerce hereinafter, a Delaware corporation, filed a complaint in two counts in the court below against seven-

teen named defendants, all citizens of Rhode Island, as individuals; and nine of them as officers and directors of the Jamestown Protective Association. Commerce alleged in its first count that it had a license from the Town of Jamestown to erect and operate an oil refinery in an area of the town zoned for such use and that the defendants "unlawfully combined and conspired to harass, delay and prevent plaintiff from exercising its right to construct and operate" its refinery and that to effectuate their "unlawful combination and conspiracy" the defendants "formed and used an organization designated as Jamestown Protective Association as part of said unlawful combination and conspiracy." On this count the plaintiff asked that the defendants be enjoined from harassing the plaintiff by suit in the court below or in any Rhode Island court or by any other means and for an award of damages against each defendant in the amount of $500,000 plus costs and exemplary or punitive damages. In its second count, repeating the allegations of count one, the plaintiff asserted a cause of action under the Sherman Anti-Trust Act, as amended, 15 U.S.C. § 1 *et seq.*,[1] and asked for injunctive relief and an award of freble damages against each defendant in the amount of $1,500,000 plus costs and a reasonable attorney's fee.

The defendants answered denying the basic allegations of the complaint, including the validity of the plaintiff's license, and counterclaimed alleging that the plaintiff's refinery when constructed and put into operation would constitute a continuing nuisance causing them great and irreparable harm. Wherefore they asked that a local safety ordinance regulating the construction of oil refineries and the license issued to the plaintiff thereunder be declared null and void. The counterclaim further prayed that the amendment to the zoning ordinance of the Town of Jamestown permitting the construction of oil refineries in a de-

[1] 26 Stat. 269, as amended.

fined area of the town and also an amendment to the local building ordinance which exempted oil refineries from the requirements of that ordinance be declared null and void and that the plaintiff be enjoined from taking any action or doing any act purporting to be authorized by its license and the amendments.

After lengthy preliminary proceedings the case came on for trial before the court below sitting without a jury at the outset of which counsel for the plaintiff announced that no evidence would be offered in support of its claim of an illegal conspiracy. On the defendants' motion the plaintiff's complaint was thereupon dismissed with prejudice and the trial proceeded on the defendants' counterclaim. More than forty days of trial produced a record consisting of thousands of pages of testimony and hundreds of exhibits a great deal of both being highly technical in nature. As a result the court below concluded (1) that the amendment of the town zoning ordinance and the safety ordinance and license issued pursuant thereto, were invalid because of the failure of the Town Council to comply with the statutory procedural requirements for enacting ordinances of the kind involved. (2) that the amendment to the local building ordinance could not be sustained as being within the lawful exercise of the police power of the municipality and was therefore invalid, and (3) that the plaintiff's proposed refinery when put into operation would constitute a nuisance. On the latter point it said:

> "After a careful consideration of all the testimony and the reasonable inferences to be drawn therefrom, and recognizing the right of the plaintiff to make a reasonable use of its lands, I am satisfied that the operation of said refinery in the manner and at the location proposed by the plaintiff will cause a substantial diminution both in the values of the defendants' properties and in their enjoyment thereof as measured by the degree of comfort which the average man

living in such a locality has the right to expect. It follows that said use will be unreasonable and hence a nuisance to the defendants against which they are entitled to injunctive relief."

Commerce has taken this appeal from the judgment entered by the court below in conformity with its opinion wherein it declared the Jamestown ordinances and the plaintiff's license invalid and, with costs to the appellees, permanently enjoined Commerce from proceeding with the erection of its refinery.

In our view there was no occasion for the court below, and there is no occasion for us, to pass upon the validity of the local ordinances and hence of the plaintiff's license, for it is the generally accepted rule that ". . . the validity or constitutionality of an ordinance is not an issue before a court, and the court need not pass upon it, . . . where the determination of it is not necessary to a proper disposition of the case . . ." 6 McQuillin, Municipal Corporations, § 20.10 (3d. ed. 1949).

The plaintiff's license was issued pursuant to a local ordinance enacted by the Town Council under the authority conferred by Section 21 of Chapter 333 of the General Laws of Rhode Island, Revision of 1938, upon town and city councils to make and ordain all ordinances and regulations for their towns or cities "which they deem necessary for the safety of their inhabitants from the manufacture, processing, storage, keeping, having in possession, sale or use of . . . crude petroleum, gasoline, kerosene, heating fuels, lubricating oils and greases, allied petroleum products, and any and all other explosives, explosive chemicals and inflammable substances . . . ." Obviously this enabling act authorizes local regulation of the handling of the substances named therein in order to provide protection from fire or explosion. There is nothing in it authorizing local governments to regulate air pollution. Indeed, authority for local regulation in that respect was conferred at the

time the local ordinance was adopted by a different enabling act. Chapter 1760 of the Rhode Island Acts and Resolves, Jan. Sess. (1946), now General Laws of R. I. (1956) §§ 23-25-21 *et seq.* Nor is there anything in the amendment to the safety ordinance or the license issued thereunder relating to air pollution. The local regulation purports to extend and extends only to risks of fire and explosion. But, the District Court did not base its finding that the plaintiff's refinery when constructed would constitute a private nuisance because of any such danger. On the contrary, it found as a matter of common knowledge that although an oil refinery was a potential source of danger from fire or explosion unless properly constructed, such dangers could "be substantially lessened if not entirely eliminated by the imposition of proper restrictions and safeguards relating to its construction."

Clearly the District Court's finding of anticipatory nuisance rested upon subsidiary findings that the refinery when in operation would pollute the air with noisesome and noxious gases, matters not covered in the amendment to the local ordinance or the license issued under it. Thus, even if we should assume arguendo that a license would be a defense, the present license would not be, for the alleged nuisance does not arise from the explosive or inflammable nature of the substances stored or the processes carried out on the premises, but from the deleterious, unpleasant and noxious effects of the gases which are the by-products of the refinery process. In this situation the license is of no consequence as pointed out in *Commonwealth* v. *Kidder*, 107 Mass. 188, 193 (1871), wherein, considering an indictment laid against an oil refinery constructed in accordance with statutory safety requirements as a common law nuisance because it polluted the air, the court said:

> "These enactments are manifestly intended to protect the public against dangers arising from the explosive and inflammable nature of petroleum; and, having regulated the whole subject in that aspect, they might

> well be deemed to protect any establishment, guarded as they direct, from indictment as a nuisance on account of such dangers only. But they contain no provisions for preventing the spread of unwholesome and offensive odors in the course of the manufacture; and if the defendants' position were sustained, the result would be that no limit would be put to such manufacture in the most crowded and populous portions of any town or city. The reasonable, if not the necessary, inference is, that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacture is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

Moreover, in spite of the minority view prevailing, apparently, in Massachusetts, see *Strachan* v. *Beacon Oil Co.*, 251 Mass. 479 (1925), we would infer from *State* v. *Barnes*, 20 R. I. 525, 529, 530 (1898), that Rhode Island would follow the majority view and hold that, while a license constitutes a defense to a prosecution for maintaining a public nuisance, a governmental "grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges." *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church*, 108 U.S. 317, 334 (1883). For citation of cases and discussion see 39 Am. Jur., Nuisances § 205 (1942); note, 52 Colum. L. Rev. 781 (1952); Prosser, Torts § 74 (2nd Ed. 1955).

Little needs to be said with respect to the amendment of the local zoning ordinance creating a refinery use district, for it is clearly established that compliance with a zoning ordinance does not protect a person from the consequences of making an unreasonable use of his property whereby he invades the private right of his neighbor. The

matter was well stated in *Weltsche* v. *Graf*, 323 Mass. 498, 500 (1948), wherein, affirming an injunction against operating a truck terminal on the edge of a zone permitting such a use but adjacent to a hotel in the zone owned by one of the plaintiffs and at the boundary of a district zoned for residences where all the plaintiffs had their homes, the court said:

> ". . . The fact that the operation of certain kinds of commercial enterprises is permitted under a zoning ordinance is an important factor in determining whether the use being made of the land in conducting a particular enterprise goes beyond what is reasonable in view of the nature and character of the locality, the effect of the use upon those who live in the neighborhood and the strength and force appropriately due to the various conflicting interests usually involved in the subject matter. But a zoning ordinance affords no protection to one who uses his land in such a manner as to constitute a private nuisance."

We think it clear from *Dunham* v. *Westerly Zoning Board*, 68 R.I. 88, 97 (1942), that this is also the law in Rhode Island for in that case, referring to persons objecting to the erection of a power station in a zone permitting that use, the court said: ". . . they will not be deprived of a suitable remedy merely because a permit under the zoning ordinance has been granted, since such a permit would not grant any right to operate a private nuisance."

There remains for consideration the amendment to the local building ordinance. Surely it could not seriously be contended that compliance by the plaintiff with the local building ordinance would afford it any protection if it used its property in such a manner as to constitute an unreasonable interference with its neighbors in the enjoyment of their property.

Since, even if valid, neither the plaintiff's license nor the amendment to the local zoning and building ordinances

would provide the plaintiff with a defense to the charge of constructing a private nuisance, it follows that there was no need for the court to pass on the validity of the ordinances, for decision of that matter was unnecessary to its disposition of the case.

We now come to grips with the basic problem on this appeal. The town of Jamestown, Rhode Island, is coextensive with the island of Conanicut in lower Narragansett Bay. The island is a little over 9 miles long and is only slightly more than a mile wide at its widest point. Its area is 9.3 square miles and its permanent population is about 2,000. A majority of the permanent population, about 75%, live in a relatively compact residential and small business district in the southerly third of the town which has a public water supply and sewer system. According to the District Court's findings: "It is primarily a residential, resort and farming area. At the present time, no industries of any sort are located thereon and there are only relatively few business enterprises, such as retail shops, stores, gasoline filling stations and hotels. It enjoys considerable popularity as a resort area during the summer."

No doubt the island has many advantages in the way of climate and scenery as a place for country living. But its popularity as a place to live does not appear to have increased very much in the last few years. As a resort it appears, if anything, to have declined. Only a few new homes have been built on the island in recent years, fewer hotels are operating than formerly and a golf course has been abandoned. It is fair to say that the island's economy is relatively static.

The island is well suited for Commerce's purpose, however, for not only is it located near the heart of industrial New England, but it also lies in the sheltered waters of Narragansett Bay and has a harbor deep enough to permit the docking of deep-draft tankers bringing crude oil from the Middle East. And it would appear that a majority of

the permanent residents of the town, no doubt anticipating a source of substantial tax revenue and employment, welcomed the construction of a refinery within its borders. This is indicated by the action of the Town Council amending the local zoning ordinance, although perhaps not strictly in accordance with the required statutory procedures, to create a refinery use district. A straw vote of the inhabitants of the town, however, provides more persuasive evidence of popular sentiment. Strong feeling for and against the erection of a refinery having been expressed by various meetings held in the town, the Town Council authorized a vote of the inhabitants qualified to vote at a general election on the question: "Are you in favor of a modern oil refinery in the northern part of the Island of Jamestown?" Of the 1020 voters checked off on the check list 777 voted "yes," 233 voted "no," and there were 10 blank or defective ballots.

The plaintiff proposes to construct its refinery on an approximately 600 acre tract of land it owns in the refinery use district created by the amendment to the zoning ordinance. That district, consisting of about 815 acres, extends across the middle of the northerly third of the island. At the time of the trial there were 16 dwellings in the district and the rest of the land therein was vacant. While a small portion of the district is swampy and overgrown with scrub, most of it, about 85%, is suitable for home sites or farming. It is not, however, being used for agricultural purposes or, indeed, for anything else. About two miles south of the district is a housing development begun about 20 years ago in which to date about 143 homes have been built, and within about one and one half miles north of the district there are 71 homes, a summer hotel and a summer camp. The center of the compact part of the town is about 2½ miles south of the district. The prevailing winds over the island are from a generally westerly direction.

There can be no doubt and indeed it is freely conceded by Commerce that substantial quantities of malodorous, and in sufficient concentration toxic, gases are generated in the process of refining crude oil, particularly "sour crudes" such as those from the Sheikdom of Kuwait which Commerce intends to process in the refinery it proposes to build in Jamestown. These gases are hydrogen sulfide (H_2S) and a group of gaseous hydrocarbons called mercaptans. Furthermore the stacks carrying the exhaust from the various heaters essential to the refinery process will discharge substantial quantities of sulfur dioxide (SO_2) into the atmosphere. This gas is not peculiar to the operation of a refinery but, as a product of combustion, is present in varying degrees in most smokestacks. It has the odor of burned sulfur matches, is detectable by its odor in concentrations of 2.5 parts per million parts of air by volume and on constant exposure is deleterious to health in concentrations of 5 or more parts per million of air by volume.

We turn our attention first to hydrogen sulfide and mercaptans. In accordance with general commercial practice about 1% of the sulfur in the crude oils Commerce proposes to refine will be removed in the form of hydrogen sulfide prior to shipment from the Middle East by a process known as stabilization. More of the sulfur will be converted in the course of the refining process into hydrogen sulfide and the residue will remain in the final products of the refinery. The hydrogen sulfide given off by the crude oil during the refining process will, according to Commerce's plan, be converted into odorless, elemental sulfur by a process which is about 96% efficient. The remaining hydrogen sulfide will be incinerated and discharged into the air as sulfur dioxide.

Mercaptans are produced at various stages of the refinery process. In Commerce's operation some will be converted into hydrogen sulfide, which will be treated as described above, others will be removed by a caustic wash

treatment and incinerated and some will be converted into hydrocarbons and form part of the gasoline and heating oils produced.

Commerce proposes a system which is completely enclosed from the tanker at the dock to the storage tanks for the finished products. When functioning properly any of the above gases not converted into elemental sulfur will be incinerated and discharged into the atmosphere as sulfur dioxide. There is no dispute that theoretically the proposed refinery would be practically 100% effective in preventing the escape of hydrogen sulfide or mercaptans into the atmosphere. In case of accident, however, there is no doubt that these gases might escape into the air and should that occur be blown by the wind not only out of the refinery area but also out of the refinery use district altogether. The real dispute as to these gases lies in the probability of the occurrence of accidents resulting in a discharge of the gases onto the defendants' properties.

Accidents in refineries as elsewhere are, of course, inevitable. And there can be no doubt that in the event of a serious accident these malodorous and toxic gases might escape and be blown onto the defendants' properties if at the time the wind happened to be blowing in their direction. But the evidence is undisputed that in a modern, well designed and well built refinery accidents allowing the escape of these gases could be minimized, one expert witness indicated practically to the vanishing point, by "good housekeeping," meaning by that, frequent and thorough inspections of the equipment, keeping the premises neat and clean, and employing skillful and competent supervisory and operating personnel. No witness, of course, could say how frequently accidents permitting the escape of these gases in substantial quantity would be likely to occur.

The District Court, however, found that the "most that can be said" for the "devices and procedures" proposed by Commerce "is that they will be nearly completely effective under the most ideal conditions." Then, noting the

highly corrosive qualities of Kuwait crude oil and the volume to be processed each day, it said that it was "satisfied that varying quantities of these [referring to hydrogen sulfide and mercaptans] obnoxious gases will find their way into the atmosphere at all times when the refinery is in operation. To assume that they will not be carried by the prevailing winds beyond the relatively small area upon which a refinery of the size contemplated is to be located would be far from realistic. On the contrary, the credible testimony in this case establishes that said gases will be carried by the prevailing winds at all times to the properties of some of the defendants, and, because of their extremely disagreeable odors in very low concentrations and their cumulative effect, they will seriously diminish both the value of the defendants' lands as residential properties and the enjoyment thereof."

The finding that there will be a continuous discharge of these gases onto the properties of some of the defendants is not supported by the evidence. For the evidence is undisputed that the malodorous gases to which the court was referring will escape into the atmosphere only in the event of some accident and there was no testimony, as indeed there could be none, as to the probable frequency of accidents in the proposed refinery resulting in the escape of these gases. Furthermore, assuming that accidents resulting in the discharge of these gases will occur in or near the center of Commerce's processing area, it is clear that if the wind at the time were blowing from any direction between northeast and south, the gases would not be carried onto the property of any defendant but out over the waters of the bay.

Sulfur dioxide, and what is referred to as general refinery odors, as contaminants of the atmosphere remain to be considered.

Little needs to be said as to the latter. It is an odor produced by a combination of the odors of hydrogen sulfide, mercaptans and the general hydrocarbon odor often

encountered at gasoline filling stations. Since there is no dispute that Commerce's plans calls for a completely enclosed system, this odor due to its composition would be present only in the event of an accident. Having already pointed out that the frequency of accidents is conjectural, it is enough to add that the testimony is convincing that any general refinery odor remaining after an accident could be quickly eliminated by prompt and thorough cleaning of the area affected. It will suffice to say that our previous discussion applies equally here and that further comments are superfluous.

Sulfur dioxide is another matter, for there is no doubt that this gas will be continuously produced in substantial quantities and the only means proposed for disposing of it is to discharge it into the atmosphere through stacks of varying heights. We are not concerned, however, with the amount of this gas in the upper air. Our concern is with the concentrations of it on the ground likely to be encountered on the properties of the defendants.

There was no expert testimony that, in view of the height of the proposed stacks and other pertinent factors, there would ever be a ground concentration of this gas on any defendant's property of as much as 5 parts per million parts of air by volume and hence enough to have an adverse effect on health. The court found, however, that there would be enough ground concentration of the gas on the defendants' properties to be perceptible. It said:

> "The credible testimony satisfies me that, depending upon atmospheric conditions, wind velocities, and the prevailing winds, as shown by the evidence of past annual weather conditions on the Island of Jamestown, there will be frequent concentrations of SO_2 on the property of the defendant Froberg in excess of 2.5 parts per million, and that it is reasonable to conclude that the properties of the other defendants will be frequently visited with similar concentrations carried to the premises by the prevailing winds and that

these concentrations will serve to effect a substantial diminution in the values of their properties and in the enjoyment thereof."

In reaching this conclusion the court specifically rejected the testimony of one expert witness with impressive qualifications by training and experience in problems of air pollution caused by refineries who had said that in his opinion the ground concentration of SO_2 beyond the nearest boundary line of the defendant nearest to the refinery, Froberg, would not exceed 0.4 parts per million even under the most unfavorable conditions. *Sub silentio* it also rejected testimony in similar vein of several other expert witnesses. The court's finding, however, has some foundation in the testimony of three experts. One of these speaking on the basis of experience said: "From a high sulfur crude and under atmospheric conditions of steady but not high velocity wind in the direction of the wind to leave the refinery I am sure that you can detect SO_2 by its irritating effect on the eyes, the nose and the throat at a distance of two or three miles: That might not happen every day, but it will happen some of the time." Another testified in somewhat the same vein although he indicated that SO_2 could be detected at a distance only by its odor and not by its irritating effect. But this witness when employed as an expert by the Town Council prior to this litigation gave as his opinion that: "Pollution by sulfur dioxide from refinery operation is seldom objectionable if limited to the concentrations resulting from burning fuel oil and the malodorous mercaptans separated in refining operations . . . . Many law suits have resulted from the discharge of sulfur dioxide into the air by smelters on account of the damage to vegetation but not from oil refinery practice." The other witness on whom the court must have relied for its finding testified on the basis of a formula, a basis other experts, including some of the appellees', rejected as wholly inadequate, one went so far as to char-

acterize it as "cockeyed," for the reason that no formula could take matters of topography into account. Moreover, the formula used by this witness was not one generally accepted in the art but the witness' own simplification of such a formula. Whatever the value of the witness' formula may be, however, according to it Commerce's refinery would produce concentrations of SO_2 on the property of the defendant nearest to it of over 2.5 parts per million only when the wind was blowing in that direction at 1 mile per hour. At zero wind velocity the result produced by the formula is admittedly absurd. At a wind velocity of 2 miles per hour the concentrations of the gas on the property nearest the refinery would drop below 2 parts per million and as the wind velocity increased the concentrations would decrease. Moreover, there is no specific evidence of the frequency of 1 mile per hour winds over Jamestown in any direction, since the data used by the expert witness who testified on this phase of the case listed all winds of less than 3 miles per hour as calm. However, computations based on this witness' testimony show that winds blow from the refinery toward the Froberg property about one twelfth of the time, and, assuming that the wind was blowing at 1 mile per hour one third of the time the wind was listed as calm, calculations show that accepting the results of the formula there would be detectable concentrations of SO_2 on the Froberg property only for about one hour in every 720 hours, or for somewhat less than one hour in every period of four weeks.[2]

With the evidence as summarized above and the findings

[2] The court below mentioned but did not pass upon the defendants' contentions that the proposed refinery would be a nuisance in other respects, such as by the glow from its flare, its illumination at night, dust from its catalytic cracking unit, smoke from its stacks and its pollution of the waters of the bay. We see no reason to consider these contentions either, for the evidence is quite inadequate to show that the refinery would constitute a nuisance in any of these respects.

of the District Court in mind, we now turn to the applicable law, which, of course, is the law of Rhode Island.

We may take it for granted that a home owner does not enjoy the absolute right to keep his neighborhood forever residential in character. Lord Justice James in *Salvin* v. *North Brancepeth Coal Co.*, L.R. 9 Ch. App. 705, 709 (1874), colorfully expressed this general rule in the statement: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes." See also *Pennsylvania Co.* v. *Sun Co.*, 290 Pa. 404, 409 (1927), a leading case cited and relied upon on another point in *Seidner, Inc.* v. *Ralston Purina Co.*, 67 R.I. 436 (1942), to be considered in detail presently, wherein the Supreme Court of Pennsylvania said:

> "In this age, persons living in a community or neighborhood must subject their personal comfort to the commercial necessities of carrying on trade and business. Where the individual is affected only in his tastes, his personal comfort, or pleasure, or preferences, these he must surrender for the comfort and preferences of the many."

No one, however, is required to submit to his neighbor's unreasonable use of his property. The Supreme Court of Rhode Island in *Blomen* v. *N. Barstow Co.*, 35 R.I. 198, 211 (1913), in considering a bill in equity by residence owners to enjoin the operation of a drop hammer in their neighborhood which made a loud thumping noise and jarred their premises, summed up its conclusion drawn from an analysis of many cases from other jurisdictions in the statement:

> "The rule of law is well settled that every person is bound to use his property so as not to injure that of another, or interfere with the reasonable and proper

> enjoyment thereof and that the carrying on of a business which creates noisesome smells, or noxious vapors, or causes great and disturbing noises, jarrings or vibrations, which affect injuriously property in the vicinity or render the occupation thereof inconvenient and uncomfortable, is a nuisance for which a person whose property is damaged or whose health is injured or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby, may maintain an action to recover compensation for the injury, and that in such case a court of equity will restrain the continuance of the nuisance by injunction."

But, to secure an injunction against a neighbor's prospective use of his property, more must be shown than the mere possibility or even probability of harm resulting from that use. Unless a proposed use will be a nuisance *per se*, which is not suggested here for it is generally held that refineries are not in that category, see *Purcell* v. *Davis*, 100 Mont. 480 (1935), courts of equity do not readily grant injunctions to restrain anticipatory nuisances. The rule in Rhode Island is to be found in the *Seidner* case cited above wherein the court at page 451 quoted *City of Lynchburg* v. *Peters*, 145 Va. 1 (1926), as follows:

> "It is a well established principle of equity jurisprudence that when a proposed structure or the use of it, is not a nuisance *per se*, a court of equity will not grant an injunction against the erection of the structure or the use, merely because it may become a nuisance. The alleged nuisance must be the necessary result or the court will await the actual results."

The Rhode Island court then went on to say in its own words:

> "We are of the opinion that to justify an injunction, in a cause of the character of the instant one

> [i.e. a suit to enjoin a prospective nuisance], the evidence must show clearly and convincingly that substantial damage to the complainant's property or business will be practically certain to result from the operation by the respondent of the business against which an injunction is sought."

To give the words of comparison used by the Supreme Court of Rhode Island ("clearly," "convincingly" and "practically certain"), the meaning the court intended them to convey we must look to the application of the Rhode Island rule in the case in which the words were used We turn therefore to consideration of the *Seidner* case in some detail.

The plaintiff Otto Seidner, Inc., at the time of suit and for many years before had operated a mayonnaise factory in a predominantly industrial section of the town of Westerly, Rhode Island. The defendant, as the lessee of adjoining land, proposed to construct a coal yard into which coal would be dumped from railroad cars standing on a siding. The plaintiff's bill in equity sought to enjoin the construction of the coal yard on the ground that coal dust would necessarily be carried by the wind into its mayonnaise factory contaminating its product thereby and preventing it from carrying on its business to its irreparable injury. It was not disputed that the proposed location of the coal bins was only 75 feet from the nearest corner of the plaintiff's building and certainly there can be no doubt that coal dust in mayonnaise would, to say the least, adversely affect its salability.

At the trial an expert witness with many years' experience in the coal business, called by the plaintiff, testified that he did not see how coal dust could possibly be prevented under certain conditions of wind from getting into the plaintiff's factory even with the precautions in the way of canvas covers during the unloading process which the defendant proposed to take. An expert called by the

defendant testified that although there would be dust from the defendant's yard there would be no appreciable amount in view of the covers the defendant proposed to use and that in any event unless there was a high wind the dust would not travel over 100 feet.

On the basis of this testimony the trial court granted the injunction prayed for, saying:

> "Considering the testimony of both experts together with the other convincing evidence in the case, it appears to us to be clearly and convincingly proved that the operation of the proposed coal bins without some dust escaping is absolutely impossible."

Expressing doubt as to the efficacy of the precautionary measures the defendant proposed to take to prevent the escape of coal dust, the court then went on to say:

> "We are satisfied that even with the canvas covering, coal dust of appreciable density and quantity will escape, which, carried by a westerly wind, will be blown into complainant's plant and especially into the mixing room, working great havoc to the food products, both completed and in process. The coal dust will also settle into and onto the glassware, making necessary a hand-washing, the cost of which, as opposed to machine washing, would put the complainant in the dilemma where it could not hope successfully to cope with competition. Irreparable injury to complainant must certainly follow."

Nevertheless, in spite of those findings the Supreme Court of Rhode Island reversed. Applying the applicable rule as quoted herein above the court said at page 451:

> "We have carefully considered the relevant evidence in this cause, being almost entirely opinion evidence, on the question whether substantial damage to the complainant will be practically certain to result from

> the operation by the respondent of its proposed business, in the place and in the manner in which the respondent intends to operate it and we are of the opinion that it has not been proved by clear and convincing evidence that such damage will be practically certain to result."

It is true that in *Seidner* the court was concerned with an attempt to enjoin a dusty business in an industrial area whereas here we are concerned with an attempt to enjoin a stack industry, so-called, in a residential, resort and agricultural area. Nevertheless, in the exercise of our appellate duty [3] to examine the defendants' evidence to see whether it meets the high standard of proof required by the Rhode Island law as stated and applied in the *Seidner* case, we feel constrained to hold that the court below erred in enjoining erection of the plaintiff's refinery as a prospective nuisance. Standing in the shoes of the Supreme Court of Rhode Island, that is to stay, applying the Rhode Island rule to the evidence and the findings in this case as we believe the Rhode Island court would apply its rule, it seems to us from the *Seidner* case that the Supreme Court of Rhode Island would not sanction enjoining the erection of the plaintiff's refinery in Jamestown. Instead, on the relatively even balance of the sharply conflicting expert testimony in the record before us, we think the Supreme Court of Rhode Island would wait to see whether the refinery constituted a nuisance when put into operation.

The judgment of the District Court is set aside and the case is remanded to that Court for the entry of a judgment dismissing the defendants' counterclaims, but without costs in this Court.

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[3] See *Brenci* v. *United States*, 175 F 2d 90, 92 (C.A. 1, 1949).

APPENDIX B

JUDGMENTS BELOW

(1) Original Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5475

COMMERCE OIL REFINING CORP., *Plaintiff, Appellant,*

v.

WILLIAM W. MINER ET AL., *Defendants, Appellees.*

JUDGMENT

June 16, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is set aside and the case is remanded to that Court for the entry of a judgment dismissing the defendants' counterclaims, but without costs in this Court.

By the Court:
ROGER A. STINCHFIELD
Clerk.

(2) Order Denying Rehearing

[Caption Omitted]

ORDER OF COURT

July 6, 1960

It is ordered that appellees' petition for rehearing filed July 1, 1960, be, and the same hereby is, denied.

By the Court:
ROGER A. STINCHFIELD
Clerk.

APPENDIX C

RULE OF COURT, STATUTES, AND ORDINANCES INVOLVED

1. Rule of Court

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

2. State Statutes

(a) Sections 45-24-1, 45-24-2, and 45-24-3 of the General Laws of Rhode Island, 1956, formerly Chapter 342, Section 1, of the General Laws of Rhode Island, 1938, provide as follows:

> "**45-24-1. Power of councils—Scope of ordinances.**—For the purpose of promoting the public health, safety, morals or general welfare, the city council of any city, and the town council of any town, upon the approval of the financial town meeting of such town, shall have power in accordance with the provisions of this chapter within the limits of such city or town by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.
>
> "**45-24-2. Division into districts—Uniformity within districts.**—For any and all of said purposes said city or town council may divide the municipality into districts of such number, shape and area as it may deem best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. All such regulations shall be uniform for each class or kind

of buildings throughout each district but the regulations in one district may differ from those in other districts.

"**45-24-3. General purposes of ordinances.**—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote the public health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such town or municipality."

(b) Sections 45-24-4 and 45-24-5 of the General Laws of Rhode Island, 1956, formerly Chapter 342, Section 2, of the General Laws of Rhode Island, 1938, provide as follows:

"**45-24-4. Hearings on ordinances.**—No such ordinance shall be enacted, amended or repealed until after a public hearing has been held upon the question of the enactment, amendment or repeal of such ordinance, before the city or town council, as the case may be, or a committee or commission authorized by such city or town council to investigate and make recommendations concerning such proposed ordinance, who shall give first notice of such public hearing specifying the time and place of such hearing by publication of such notice in a newspaper of general circulation within such city or town at least once each week for three (3) successive weeks prior to the date of such hearing, at which hearing opportunity shall be given all persons interested to be heard upon the matter of the proposed ordinance.

"**45-24-5. Amendment and repeal of ordinances—Landowners' protests.**—The city or town council, as the

case may be, shall have power, after a public hearing as herein provided, from time to time to amend or repeal any such ordinance and thereby change said regulations or districts; provided, that, if there shall be filed in the office of the city or town clerk of such city or town on or before the day of such hearing or within three (3) days thereafter a written protest against such proposed amendment or repeal signed and acknowledged by the owners of twenty per cent (20%) or more of the street frontage of the property proposed to be affected, or by the owners of twenty per cent (20%) or more of the street frontage directly opposite the property proposed to be affected, or by the owners of the property abutting on twenty per cent (20%) or more of the boundary line between the property proposed to be affected and the property immediately in the rear thereof when there is no street between said properties, no such amendment or repeal shall be passed except by a three-fifths vote of such city or town council and the approval of the mayor of such town or city, or if disapproved by such mayor, by a like vote as may be required by law to enact an ordinance in the case of disapproval by the mayor of such town or city. The word 'owner' as used in this section shall not be construed to include attaching creditors or lien holders other than mortgagees."

(c) Sections 23-27-1 to 23-27-4 of the General Laws of Rhode Island, 1956, formerly Chapter 333, Section 52, of the General Laws of Rhode Island, 1938, as added by Public Laws of Rhode Island, 1950, Chapter 2525, Section 1, provide as follows:

"**23-27-1. Ordinances regulating construction and equipment of buildings.**—Town and city councils may from time to time make and ordain all ordinances and regulations for their respective towns and cities, not repugnant to law, as they may deem necessary, regulating the manner of constructing and equipping of all buildings and other structures within said town or city which may be erected, altered or repaired after the passage of such ordinance.

"**23-27-2. Hearings on building ordinances.**—No such ordinance shall be enacted, amended or repealed until

after a public hearing has been held upon the question of the enactment, amendment or repeal of such ordinance, before said town or city council, which council shall first give notice of such hearing by publication in a newspaper printed in said town or city, if any, and, if none, then in a newspaper published in the county in which said city or town is located.

"23-27-3. **Inspector of buildings—Appointment and duties.**—Said town or city council shall have the power to appoint an inspector of buildings and define his duties in the issuance of building permits and in the administration and enforcement of such ordinance.

"23-27-4. **Penalties for ordinance violations—Prosecution.**—Said town or city council shall have power to provide a penalty for the violation of any ordinance enacted under the authority herein given by a fine not exceeding one hundred dollars ($100) for each offense, such fine to inure to said town or city, and may also cause suit to be brought in the supreme or superior court in the name of said town or city to restrain the violation of or to compel compliance with the provisions of any such ordinance."

(d) Section 23-36-1 of the General Laws of Rhode Island, 956, formerly Chapter 333, Section 21, of the General Laws f Rhode Island, 1938, as amended by Public Laws 1953 1st special session), Chapter 3233, Section 1, provides s follows:

"23-36-1. **Ordinances regulating manufacture and handling of explosives and inflammables—License.**—Town councils and city councils may from time to time make and ordain all ordinances and regulations for their respective towns, not repugnant to law, which they may deem necessary for the safety of their inhabitants from the manufacture, processing, storage, keeping, having in possession, transportation, sale or use of gunpowder, guncotton, dynamite, nitroglycerine, nitrogelatine, lyddite, chlorate of potash, picric acid, sodium, calcium carbide, acetylene gas, gasoline gas, crude petroleum, gasoline, kerosene, heating fuels, lubricating oils and greases, allied petroleum products,

and any and all other explosives, explosive chemicals and inflammable substances; and may prohibit the manufacture, storage, keeping, having in possession, transportation, sale or use by any and all person or persons of any or all said substances and gases in their respective towns, unless a license for the same shall be first obtained from the town council or city council, which license shall be henceforth effective unless revoked for good and sufficient cause by order of said town council or city council. Any person violating any provision of any ordinance, regulation or prohibition, authorized by this section shall be fined not less than twenty dollars ($20.00) nor more than one hundred dollars ($100) for each such offense."

3. Municipal Ordinances

(a) The basic Jamestown zoning ordinance, ch. XXXV, is Ex. BB at 3 R. 284-293. (The zoning map is Ex. LL at 3 R. 317-329.)

(b) The amendment to the Jamestown zoning ordinance, which purported to authorize the creation of a refinery use district, is Ex. S at 3 R. 267-269.

(c) The basic Jamestown building ordinance, ch. XLIV, is Ex. CC at 3 R. 294-314.

(d) The amendment to the Jamestown building ordinance, which purported to exempt oil refineries from its provisions, is Ex. T at 3 R. 269-270.

(e) The Jamestown licensing ordinance, ch. 50, is Ex. U-1 at 3 R. 270-279.

In the present posture of the case, which complains that the court below dismissed the allegations of petitioners' counterclaims regarding these ordinances without consideration of their merits, see the first Question Presented and "First", pp. 2 and 32-33 of the Petition, *supra*, it is not deemed necessary to repeat the detailed provisions of the ordinances in question.

APPENDIX D

DEMONSTRABLE FACTUAL ERRORS IN THE COURT OF APPEALS' OPINION

We list here the most significant errors committed by the court below in the course of its reappraisal of the testimony in the present case. Some of these involve demonstrable misstatements; e.g., item 1, the geography of Jamestown, and item 3, the location of certain of the petitioners' homes in relation to the site of the corporation's proposed refinery. Another, item 5, the validity of Dr. Schutt's formula, involves a question of credibility and a denigration of that expert's testimony unsupported by the record. Others, such as items 6 and 7, summarizing the probable effects of the corporation's refinery operations, involve a reevaluation of the testimony contrary to the weight of that testimony and at variance with the district court's findings. Finally, item 8, exposure to sulfur dioxide, ignores testimony of record, and fails in addition to give adequate weight to the Rhode Island law, which holds that discomfort rather than uninhabitability is the measure of private nuisance.

1. *The geography of Jamestown.* The court of appeals said (p. A34), "A majority of the permanent population, about 75%, live in a relatively compact residential and small business district in the southerly third of the town which has a public water supply and sewer system."

The fact is that the southerly third of the island has only a single year-round resident, and that the compact residential area is in the middle third of the town. See R. 874t-875t, 908t-910t, 970t (testimony of the corporation's witnesses); see also pp. 6-7, *supra*, and the map following p. 41, also *supra*.

The district judge, who took a view (5 R. 1052-1055), of course made no such mistake.

2. *The prevailing winds.* The court of appeals said (p. A35), "The prevailing winds over the island are from a generally westerly direction."

The fact is (1 R. 9t-11t) that the prevailing wind is westerly in only one month, December, and that in no month is a westerly wind the second highest prevailing wind. In seven months of the year, winds from the south-west prevail. In one month, February, west-north-west winds prevail, and that direction is second in two other months. (1 R. 9t-11t.)

The district court found (3 R. 73; p. A17) that "The evidence establishes that the prevailing winds on the island are from the southwest and from the northwest."

3. *Effect of south wind on some of petitioners.* The court of appeals said (p. A38) that "if the wind at the time were blowing from any direction between northeast and south, the gases would not be carried onto the property of any defendant but out over the waters of the bay."

The fact is that the houses of both the petitioners McGaughan and Lunsford are directly north of the refinery use district (4 R. 542; and see map following p. 41 *supra*). Consequently with a south wind, which prevails in two months and is secondary in four months more (1 R. 9t-11t), the gases and odors from the proposed refinery would be carried directly to those petitioners' homes.

4. *Whether corporation's refinery was completely inclosed.* The court of appeals said (p. A37), "Commerce proposes a system which is completely enclosed from the tanker at the dock to the storage tanks for the finished products."

The fact is that the corporation's plans contemplated an oxidation pond, which must be open (1 R. 246t-247t), as well as a coke storage area, likewise open (Def. Ex. XXX, 6 R. 1879). Both of these exude odors (1 R. 247t; 2 R. 1027t, 1086t).

The district court considered the oxidation pond in its findings (3 R. 77; p. A21).

5. *Dr. Schutt's qualifications.* The court of appeals said (p. A41) with respect to Dr. Schutt, a consulting engineer (1 R. 195t-198t) called by petitioners as an expert, "the formula used by this witness was not one generally accepted in the art but the witness' own simplification of such a formula."

The fact is (2 R. 1174t) that the formula used by Dr. Schutt "is common practice in oil refineries solving such problems," testimony that was not contradicted by any witness.

The reliability of Dr. Schutt's computations is underscored by his use of the materials balance, viz., a determination made of the products and by-products which are emitted by a refinery on the basis of the nature and amount of the raw materials which go there to be refined (2 R. 1016t; 5 R. 1307-1308).

Dr. Schutt prepared a materials balance for the corporation's proposed refinery on the basis of its processing Kuwait sour crude, and determined that the resultant output of sulfur dioxide (SO_2) would be on the order of 35 to 40 short tons per day (2 R. 1063t).

Mr. Sutherland, the corporation's engineer witness who supervised the design of the proposed refinery (1 R. 373t-391t), was asked, and promised to, to produce a materials balance (5 R. 1308-1311). Although the witness testified that such a balance was in existence (5 R. 1308), he later refused to produce it (5 R. 1391).

Thereafter, the corporation's engineer witness Hartwig did produce such a balance (2 R. 1221t *et seq.*), and according to his estimate the total SO_2 exhausted to the air from the corporation's proposed refinery would be 37 tons per day (2 R. 1245t; see Ex. BBBB, 6 R. 1901).

Consequently, quite apart from the legal impropriety on the part of the court of appeals in reevaluating the credi-

bility of the expert witnesses whom it did not and could not see (opinion, pp. A40-A41, and see discussion in Petition at pp. 33-37), quite apart from the inappropriateness of its exercise in advocacy, viz., rehabilitating the corporation's expert who had been disbelieved by the district court for cause (3 R. 80-81; p. A24; compare p. A40; see discussion in Petition at pp. 23-24 and 36), and minimizing the testimony of Dr. Schutt, who very obviously was believed by the district court, the fact is that on the basis of the corporation's witness Hartwig's testimony (2 R. 124-5t), one of Dr. Schutt's essential conclusions was fully corroborated.

6. *Continuous discharge.* The court of appeals said (p. A38), "The finding that there will be a continuous discharge of these gases onto the properties of some of the defendants is not supported by the evidence."

If "gases" include odors, then the fact is otherwise, for there was considerable evidence that a refinery always has a smell, that the escape of odors therefrom is inevitable (1 R. 67t, 86t-88t, 113t, 119t, 138t), and that the odor is cumulative (1 R. 145t). See pp. 22, 25-26 of the Petition, where the evidence is set out in detail.

Moreover, and this was a circumstance ignored by the court of appeals, the island has frequent fogs (1 R. 12t-18t), a condition which one of the corporation's experts admitted "means that your air pollution conditions would increase" (1 R. 623t).

The district court found (3 R. 73; p. A17) that "fogs of varying duration enveloping the island occur with relative frequency" and its conclusion as to the diffusion of SO$_2$ was based in part upon "atmospheric conditions" (3 R. 81; p. A24).

7. *Odor as caused only by accidents.* The court below said (p. A38) that "the evidence is undisputed that the malodorous gases to which the [district] court was referring will escape into the atmosphere only in the event of some accident and there was no testimony, as indeed there

could be none, as to the probable frequency of accidents in the proposed refinery resulting in the escape of these gases."

The fact is that odors are not caused only by major malfunctionings, such as the court of appeals seems to have had in mind, but result from the multitude of minor leaks and spills (1 R. 117t), which are inevitable in a refinery such as the corporation proposes, which (3 R. 74; p. A18) "will comprise among other structures at least fifteen stacks ranging from twenty to two hundred feet in height which will contain many thousands of feet of piping, countless joints and connections, nearly one hundred unfired pressure vessels of varying sizes and construction, approximately four hundred pumps, thousands of seals and compressors, tanks, heat exchangers, and like equipment."

Consequently, since accidents and particularly minor accidents are admittedly inevitable—the corporation's own designer admitted (1 R. 530t) that "I don't think you can ever leave out the possibility that leaks will occur"— (see also Petition at pp. 21-22, *supra*, for the testimony in detail), there is created a general refinery odor—which has a cumulative effect (1 R. 145t).

Or, as expressed by another witness (1 R. 219t, 220t):

> "A. The general odor created in a refinery, that is sometimes characterized as oil smell, is created by minor or more serious leaks in the process units, such as through lines, stuffing boxes of pumps, through a loose flange which can happen when one considers the multitude of pipe connections which are contained in a process unit. Those leaks, when released in the atmosphere, are, to my way of thinking, generally responsible for the oily smell or odor.
>
> "Also, I make—I add one more thing: Open waste separators—in an oil refinery they are open—where water is settled also creates a typical refinery odor.
>
> "Q. Are these odors perceptible outside of the refinery itself?

"Mr. Duggan [counsel for the corporation]: Are we referring to any particular—

"Mr. Moore [counsel for the residents]: No, this refinery, this refinery.

* * * * *

"A. Yes.

* * * * *

"Q. Would you answer with respect to refinery odors being perceptible outside of the refinery—do you have an opinion whether that would apply to this refinery?

"A. In a magnified form because processing of sour crude creates stronger odors than processing a sweet crude."

The result is that, by ignoring the testimony on both sides as to the inevitability of accidents (Petition, p. 21), and by similarly ignoring the testimony that "A refinery always smells" (1 R. 113t; and Petition, pp. 25-26), the court of appeals has not only committed a procedural irregularity (Petition, pp. 33-37), it has made a grave and indeed critical factual error. Indeed, its conclusion lends substance to Jeremy Bentham's taunt that jurisprudence is the science of being methodically ignorant of what everyone else knows.

8. *Effect on comfort.* The court of appeals said, with respect to SO_2 (p. A36), that "on constant exposure [it] is deleterious to health in concentrations of 5 or more parts per million of air by volume," and further that (p. A39), "There was no expert testimony that * * * there would ever be a ground concentration of as much as 5 parts per million parts of air by volume and hence enough to have an adverse effect on health."

There was, however, testimony that the ground concentration of SO_2 at the petitioner Froberg's home would be as high as 3.88 parts per million, which greatly exceeds the minimum level of detectability and discomfort of 2.5 parts per million (2 R. 1066t, 1068t).

There was also testimony that, in respect of sick individuals, or with those suffering from bronchitis or heart disease, the effect of the SO_2 would be aggravated (4R. 956-957).

Here the error of the court of appeals is essentially a legal one, for under Rhode Island law it is not necessary that, to constitute a nuisance, a complainant's home be rendered uninhabitable; it is sufficient that what is done by the defendant "causes a substantial diminution either in the value of adjacent property, or in the enjoyment thereof as measured by the degree of comfort which the average man living in such a neighborhood has a right to expect." *Kennedy* v. *Fyfchette*, 45 R.I. 399, 406, 123 Atl. 146, 148; and see Appendix E, immediately following.

APPENDIX E

THE RHODE ISLAND LAW OF NUISANCES

1. *Generally.* There are four leading Rhode Island decisions on the law of nuisances.

(i) *Aldrich* v. *Howard*, 8 R. I. 246 (1865). Here the plaintiff, the owner of a dwelling house, recovered damages for the nuisance caused by the defendant's nearby livery stable, which admittedly was properly built and kept, and the verdict was sustained on appeal.

In answer to the defendant's contention that the jury had been misdirected, the Supreme Court of Rhode Island said (8 R. I. at 248-249):

"The instructions are, that the noises and the smells, in order to become a nuisance, must create an annoyance to such an extent as to render life uncomfortable, or to render the house uncomfortable as a dwelling house and unfitted for the proper purposes for which it was designed. The rules thus referred to hold, that it is not necessary that the house should be rendered useless in order to

maintain an action, but that it is quite sufficient that the injury should be such as to render the enjoyment of life there uncomfortable. We think, therefore, that for all the purposes of this case, the charge is not open to the objection that it does not sufficiently or correctly define a nuisance at common law."

(ii) *Blomen, Frederickson* v. *N. Barstow Co.*, 35 R. I. 198, 85 Atl. 924 (1913). Here the owners of dwelling houses sought an injunction against the respondent's operation of drop hammers. Pending appeal, the operation of the 500 lb. hammer was restricted to 4 hours a day. On appeal, the court held that complainants were entitled to an injunction against any further operation of the hammers.

At pp. 203-204 of 35 R. I., p. 926 of 85 Atl., the Supreme Court of Rhode Island quoted with approval the statement of the New York court in *Fish* v. *Dodge*, 4 Den. 311, 316, "It is not necessary to a right of action that the owner should have been driven from his dwelling: it is enough that the enjoyment of life and property has been rendered uncomfortable."

At p. 211 of 35 R. I., p. 928 of 85 Atl., the Supreme Court of Rhode Island said:

"The rule of law is well settled that every person is bound to use his property so as not to injure that of another, or interfere with the reasonable and proper enjoyment thereof and that the carrying on of a business which creates noisome smells, or noxious vapors, or causes great and disturbing noises, jarring or vibrations, which affect injuriously property in the vicinity or render the occupation thereof inconvenient and uncomfortable, is a nuisance for which a person whose property is damaged or whose health is injured or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby, may maintain an action to recover compensation for injury, and that in such a case a court of equity will restrain the continuance of the nuisance by injunction."

(iii) *Kennedy* v. *Frechette*, 45 R. I. 399, 123 Atl. 146 (1924). In this case the owner of residential property sought an injunction against the operation of a factory in which saws and woodworking machinery were used to manufacture tennis racquets. One trial judge issued a preliminary injunction. On further hearing, another trial judge entered a permanent injunction which limited the respondent to 2 hours a day for the use of his circular saws, limited the thickness of the wood that could be cut on them, restrained him from operating after 5 P. M. and on Sundays, and required him to keep his factory windows closed. On appeal, the Supreme Court of Rhode Island held that the complainant was entitled to an unlimited injunction against the operation of the saws and the woodworking machinery.

The court said (45 R. I. at 405-406, 123 Atl. at 148),

"The location is always an important consideration in the determination of the existence of a nuisance. It is clear that the location in question is *not* a manufacturing one. * * * Respondent now seeks to change the character of this section west of Broadway [in the City of Pawtucket] by the establishment of a factory therein. Anyone living in a city must put up with the usual and ordinary noises of city life; in this vicinity also with any of the usual results incidental to the use of the shops on Broadway. Certain additional annoyance and inconvenience often is inevitable as the city grows and changes, but the amount thereof which may be caused by any individual without thereby creating a nuisance is to be decided upon consideration of all the facts in any given case. Is the use of the property in this particular location reasonable or unreasonable, considering not only the rights of the owner, but also those of his neighbor. If such use causes a substantial diminution either in the value of adjacent property, or in the enjoyment thereof as measured by the degree of comfort which the average man living in such a neighbor-

hood has a right to expect, it may properly be held to be unreasonable and hence a nuisance.

"The operation of this factory has diminished the value of complainant's land. The operation of the circular saws two hours daily deprives complainant for that length of time of the comfortable and reasonable enjoyment of her home and results in an unwarranted and illegal disturbance of her rights. That the time of operation is limited, affects the extent of the injury but does not change the nature thereof."

(iv) *Seidner, Inc.* v. *Ralston Purina Co.*, 67 R. I. 436, 24 A. 2d 902 (1942). Complainant, owner of a mayonnaise factory in a part of Westerly, R. I., zoned for heavy industry, sought an injunction against respondent's proposed operation of a coalyard, on the ground that the anticipated coal dust would seep into complainant's mayannoise products. On the basis of sharply conflicting opinion evidence, the trial judge granted an injunction. This was reversed on appeal, the Supreme Court of Rhode Island saying (67 R. I. at 451, 24 A. 2d at 909),

> "to justify an injunction, * * * the evidence must show clearly and convincingly that substantial damage to the complainant's property or business will be practically certain to result from the operation by the respondent of the business against which an injunction is sought."

2. *Residential versus Business.* The guideline here, see *Kennedy* v. *Frechette*, 45 R. I. 399, 405, 123 Atl. 146, 148, is that "The location is always an important consideration in the determination of the exisistence of a nuisance."

Significantly enough, the plaintiff or complainant whose property was in a residential section won in the *Aldrich*, *Blomen*, and *Kennedy* cases. The respondent prevailed only in *Seidner*, where the complainant's property was located in a predominantly industrial section of the community.

3. *Countervailing Public Benefit.* In *Blomen, Frederickson* v. *N. Barstow Co.*, 35 R. I. 198, 209-210, 85 Atl. 924, 928, the Rhode Island court squarely rejected the notion that economic or other benefit to the community would assist in justifying what would otherwise be a nuisance; it said: "Respondent's counsel argue that the granting of an injunction in such cases is within the discretion of the court; and that it will not be granted where it will be inequitable between the parties or will work detriment to the public or will involve damage to the defendants engaged in a lawful business disproportionate to the damage to the complainant from the continuance of the alleged nuisance.

"Such an argument was made in *Broadbent* v. *Imperial Gas Co.*, 7 De G., M. & G. 436. The complaint was that vegetables growing in the market-garden of the complainant were injured by the gas of that company, and the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account the court would not exercise its power to restrain the manufacture of the gas. Lord Cranworth, at p. 462, says: 'If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on.' He further remarks, 'but unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substantially damaged, that he is only to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the vice-chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplied with gas'. This case was affirmed on appeal, (7 H. L. Cas. 600)."

4. *Degree of Disturbance necessary to constitute Nuisance.* See *Aldrich* v. *Howard; Blomen; Frederickson* v. *N. Farstow Co.;* and *Kennedy* v. *Frechette*, all *supra;* discomfort rather than eviction is the measure of nuisance.

In the *Aldrich* case, the court said (8 R. I. at 249), "The question still is, does it in fact render life uncomfortable?" Or, as phrased in the *Kennedy* case, 45 R. I. at 406, 123 Atl. at 148, "If such use causes a substantial diminution * * * in the enjoyment thereof as measured by the degree of comfort which the average man living in such a neighborhood has a right to expect, it may properly be held to be unreasonable and hence a nuisance."

5. *Continuous versus Intermittent Disturbance.* That intermittent discomfort, as distinguished from continuous annoyance, does not render the condition in question any less a nuisance, is established by *Kennedy* v. *Frechette, supra,* where the Supreme Court of Rhode Island set aside an injunction which permitted partial operation of noisy factory machines. It said (45 R. I. at 406, 123 Atl. at 148), "That the time of operation is limited, affects the extent of the injury but does not change the nature thereof."